

No. 9210.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SEA INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY, LTD., and THE TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED,

Appellants,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Owner of Steamship "ARKANSAN", etc.,

Appellee.

PETITION FOR REHEARING.

BIGHAM, ENGLAR, JONES & HOUSTON,
99 John Street, New York, N. Y.

YOUNG & KELLY,
634 South Spring Street, Los Angeles, California,
Proctors for Appellants and Petitioners.

L. J. MATTESON,
A. J. McELHINNEY,
H. R. KELLY,
F. R. JOHNSTON,
Of Counsel.

FILED

MAY 11 1940

PAUL P. O'BRIEN,
CLERK

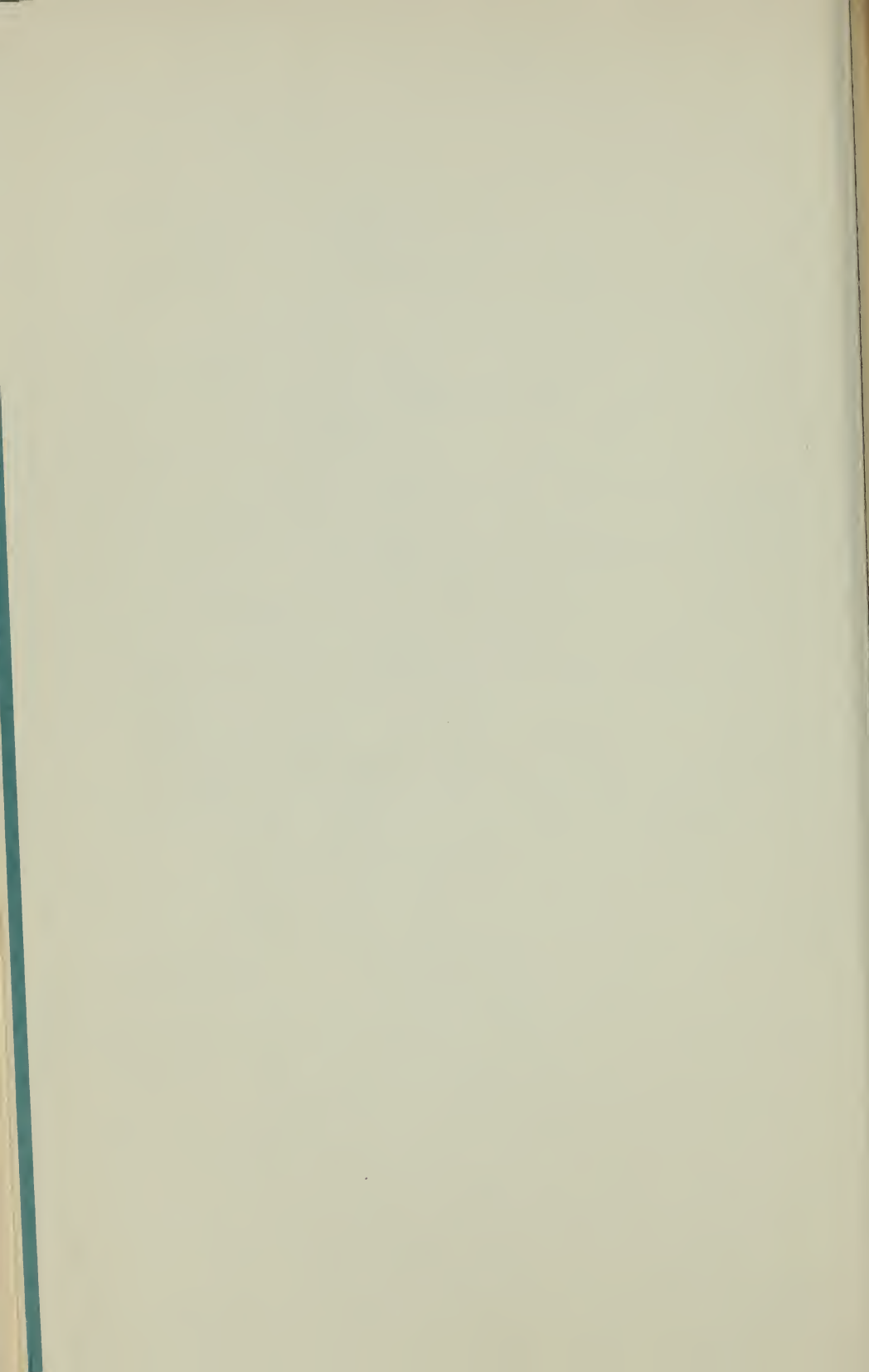


TOPICAL INDEX.

	PAGE
Petition for Rehearing.....	1
Certificate of Counsel.....	7

TABLE OF AUTHORITIES CITED.

	PAGE
Albert Dumois, 177 U. S. 240, 20 Sup. Ct. Rep. 595.....	5
Chester O. Swain, 1931 A. M. C. 1599.....	5
Conehatta, 1928 A. M. C. 339.....	5
Manchioneal, 243 Fed. 801.....	5
Protector, 113 Fed. 868.....	5
The Adriadne, 80 U. S. 475.....	5



No. 9210.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SEA INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY, LTD., and THE TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED,

Appellants,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Owner of Steamship "ARKANSAN", etc.,

Appellee.

PETITION FOR REHEARING.

The petition of The Sea Insurance Company, Ltd., Eagle Star Insurance Company, Ltd., and The Tokio Marine and Fire Insurance Company, Limited, respectfully prays for a rehearing of this appeal for the following reasons:

In the view which it has taken of the evidence in this case, this Court in its opinion has emphatically expressed its condemnation of the conduct of the witnesses from the "KNOXVILLE CITY" and the faulty navigation of that vessel. In doing so, the Court has resolved certain doubts as to the navigation of the "ARKANSAN" in favor of that vessel to the serious detriment of innocent cargo interests on the "KNOXVILLE CITY" which were, of

course, entirely free from any participation in the navigation of the "KNOXVILLE CITY" or in the conduct of the witnesses from that vessel.

The Court in its opinion has indicated clearly its appreciation of the fact that the "ARKANSAN" was guilty of fault in not observing the "KNOXVILLE CITY" until approximately two minutes before the actual collision, when the vessels could not have been more than two ship lengths apart. In its opinion the Court said:

"The failure sooner to see the 'Knoxville City' in no way contributed to the collision."

Similarly, it is evident that the Court had in mind the fact that the "ARKANSAN" was at fault also after the "KNOXVILLE CITY" was first observed in keeping her engines stopped for a very vital period of one-half a minute before they were reversed. In excusing this fault, the Court said:

"The half minute wait to reverse was due to the confusion in the 'Arkansan's' captain's mind * * *."

The confusion in the mind of the captain of the "ARKANSAN" which was responsible for his failure to back his engines immediately was the direct result of the previous negligent failure of anyone on board the "ARKANSAN" to see the "KNOXVILLE CITY" until the two vessels had gotten within about two ship lengths of each other. It was the sudden discovery of the "KNOXVILLE CITY" looming up at this short distance that threw the mind of the captain of the "ARKANSAN" into such confusion that he failed to back his engines immediately, as he should have. Obviously, if the captain of the "ARKANSAN" had seen the "KNOXVILLE CITY" for the prior

period of some six or seven minutes which had elapsed after the "KNOXVILLE CITY" had left her mooring, and while she was moving in plain sight out toward the entrance between the breakwaters, he would have had ample time to consider the situation at his leisure and he would not have been thrown into confusion by the sudden discovery of that vessel so close at hand. The one-blast whistles could have been sounded at a very much earlier period, and after waiting for a reasonable interval to see whether the "KNOXVILLE CITY" would slow down her engines, or manifest in some way an intent to pass under the stern of the "ARKANSAN", the captain of that vessel could have sounded either a danger signal, or a series of danger signals in an effort to have the "KNOXVILLE CITY" do what her one whistle signals had bound her to do. There would then have been no reason to exchange these whistle signals hurriedly in a period of less than one-half a minute with no opportunity left to the captain of the "ARKANSAN" to see whether the signals were being complied with, or to take the necessary steps after he saw that they were not being complied with. He would have had at least three or four minutes in which to observe these things at his leisure and to observe just what the "KNOXVILLE CITY" was doing.

That the Court appreciated the importance of keeping the "KNOXVILLE CITY" under observation for some time previous to the collision is indicated by its statement in the main opinion herein that—

"As the 'Knoxville City' proceeded from the westerly toward the entrance, the 'Arkansan' could not be sure whether or not she was shifting to an anchorage to the easterly inside harbor, or about to

steam to sea. The courses of the two vessels actually crossed at the point of collision inside the jetty. It was a situation where it was more likely that the 'Knoxville City' would leave port through the entrance *but a ship approaching from the outside could not be certain.*" (Italics ours.)

The very uncertainty of the movements of the "KNOXVILLE CITY" and the direction of her future course required that she be kept under constant observation as the "ARKANSAN" approached the entrance to the breakwaters for an appreciable interval and that the necessary signals be sounded to her in ample time to give the navigator of the "ARKANSAN" an opportunity to decide upon his own future course.

By reason of the fact that no one on the "ARKANSAN" saw the "KNOXVILLE CITY" until two minutes before the collision when the vessels were not more than a few hundred feet apart, a very dangerous situation was thrust suddenly upon the captain of the "ARKANSAN" in which his mind was naturally thrown into confusion and he did not have the proper amount of time in which to consider the situation or act as he would have acted if he had had time for proper consideration. But this confusion was every bit as much the result of his own failure to see the "KNOXVILLE CITY" some five or six minutes previously as it was due to any reckless navigation on the part of the "KNOXVILLE CITY".

The Court excused this confusion in the mind of the captain of the "ARKANSAN" on the ground that it was an act *in extremis* brought about by the reckless navigation of the "KNOXVILLE CITY", apparently overlooking the important fact that actually it was the negligent failure

of the "ARKANSAN" itself to see the "KNOXVILLE CITY" at an earlier time which brought about this confusion.

It is a well established principle of law that no navigator can excuse faulty navigation by claiming that it occurred *in extremis* where the conditions which made it necessary for him to act *in extremis* were the result of previous neglect on his own part.

Albert Dumois, 177 U. S. 240, 252, 20 Sup. Ct. Rep. 595;

Manchioneal, 243 Fed. 801, 804, 805;

Protector, 113 Fed. 868.

Furthermore, confusion and indecision are not considered acts *in extremis* particularly where the condition of confusion and indecision have resulted from antecedent negligence.

Chester O. Swain, 1931 A. M. C. 1599;

Conehatta, 1928 A. M. C. 339, 343.

In condemning the failure of the "KNOXVILLE CITY" to maintain a proper lookout, the Court has cited the decision of the Supreme Court of the United States in the case of *The Adriadne*, 80 U. S. 475, 479, requiring that all doubts as to whether failure to maintain a proper lookout should be resolved against the vessel guilty of the failure. The Court in its view of the facts very properly resolved this doubt against the "KNOXVILLE CITY" because of her failure to maintain a proper lookout. Though recognizing that the "ARKANSAN" was likewise guilty of a failure to maintain a proper lookout, this Court, nevertheless, resolved the doubt as to whether the "ARKANSAN'S" failure contributed to the collision in favor of

the "ARKANSAN" rather than in favor of the innocent cargo interests on the "KNOXVILLE CITY" which were, of course, free from any guilt and had no active part in the navigation of either vessel. We would respectfully ask, therefore, that a re-argument be granted to the innocent cargo interests herein in order that this question may be considered more fully and in order that the effect of the previous neglect on the part of the navigator of the "ARKANSAN" with respect to his subsequent act *in extremis* may be brought to the attention of the Court.

We understand that the appellant Isthmian Steamship Company is filing a petition for rehearing on somewhat broader grounds. In the event that that petition is granted, these appellants would desire to be heard in support of some of the contentions therein made. These appellants therefore respectfully request that the grounds for re-argument put forward in the petition of Isthmian Steamship Company be treated as also incorporated in this petition.

Respectfully submitted,

BIGHAM, ENGLAR, JONES & HOUSTON,
99 John Street, New York, N. Y.

YOUNG & KELLY,

634 South Spring Street, Los Angeles, California,
Proctors for Appellants and Petitioners.

L. J. MATTESON,
A. J. McELHINNEY,
H. R. KELLY,
F. R. JOHNSTON,
Of Counsel.

Certificate of Counsel.

Frank R. Johnston, one of the proctors for appellants and petitioners herein hereby certifies that in his judgment the petition for rehearing herein is well founded and is not interposed for the purposes of delay.

FRANK R. JOHNSTON.
frc - 1